IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 439.

CHARLES I. DAWSON, Attorney General of the State of Kentucky, et al., - - - - Appellants,

versus

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, - - - - - - - - Appellee.

BRIEF FOR APPELLANTS.

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Attorney General,
W. T. FOWLER,
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Westerfield-Bonte Co., Incorporated, Louisville, Ky.

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BRIEF FOR APPELLANTS.

STATEMENT.

At the regular 1920 Session of the General Assembly of the Commonwealth of Kentucky there was passed by the Assembly, and approved by the Governor on the 12th day of March, 1920, an act entitled:

> "AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the State, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the

amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the tax so collected; repealing all other license, franchise and excise taxes on the business covered by this act, and declaring an emergency to exist."

This act is quoted in full in the appendix to this brief. The act carried an emergency clause, which, under the provisions of Section 55 of the Constitution of Kentucky, made it operative immediately upon its approval by the Governor. The law requires those subject to its provisions, on or before the 1st day of June, 1920, and on the first day of each month thereafter, to file reports with the Auditor of Public Accounts, showing the amount of tax due on the respective filing dates, and at the same time such reports are filed it is required that payment shall be made to the Auditor of the tax due as of the respective filing dates. Before the first report provided for in the act was due, the appellee, Kentucky Distilleries & Warehouse Company, filed in the district Court of the United States for the Eastern District of Kentucky its bill in equity against Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, Victor A. Bradley, Commonwealth's Attorney of the Fourteenth Judicial District of Kentucky, and John J. Craig, Auditor of Public Accounts of the Commonwealth of Kentucky, attacking the constitutionality of the law. A copy of the bill is found

on pages 1 to 13, both inclusive, of the printed transcript of the record.

It is alleged in the bill that the Kentucky Distilleries & Warehouse Company, the appellee herein, is a corporation organized under the laws of the State of New Jersey; that it owns distilleries, warehouses and bottling plants located in the State of Kentucky, and that for many years prior to the 16th day of January, 1920, it was engaged in Kentucky, as well as elsewhere, in the manufacture and distillation of whiskey, alcohol and high wines for beverage purposes, and in the storing of same in its bonded warehouses in Kentucky and elsewhere and the sale and distribution of same therefrom; and that since the 16th day of January, 1920, it has been engaged in the sale and distribution of such liquors for the purposes now permitted by law. It also appears from the bill that large quantities of the whiskey now stored in the bonded warehouses of appellee in Kentucky have heretofore been sold to customers in various parts of the country, which sales were effected through the medium of warehouse receipts, and that the liquor represented by these warehouse receipts is now held in the bonded warehouses of appellee in Kentucky subject to the order of the owners thereof; that such owners of such warehouse receipts are looking to the appellee as warehouseman and are insisting that it shall perform the duties of a warehouseman with reference to such liquor, and that from day to day the holders of such receipts are demanding

that the appellee ship under bond their whiskey from Kentucky to other States and that appellee is complying with such orders and shipping said whiskey. It also appears from the bill that appellee is bottling whiskey in bond in Kentucky and selling same to the trade. In addition to the whiskey in appellee's bonded warehouses located in Kentucky, represented by warehouse receipts in the hands of purchasers, appellee has stored therein large quantities of liquor belonging to itself, which it is disposing of through the medium of warehouse receipts and in the form of bottled-in-bond case goods. It is alleged in the bill that from March 12, 1920, the effective date of the law attacked in the bill, up to the date the bill was filed, which was May 14, 1920, there had been removed from appellee's bonded warehouses in Kentucky 86,986 proof gallons of whiskey and there had been transferred under bond from such warehouses in Kentucky to warehouses located in other States 7,870 gallons of whiskey. Although the bill is silent on this point, it is, of course, true that the appellee has collected the fifty cent tax on all of the liquor which has been removed from bond or transferred from its Kentucky warehouses under bond since the effective date of the law, and that it now has such tax in its possession.

The appellants, Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, Victor A. Bradley, Commonwealth's Attorney of the Fourteenth Judicial District of Kentucky, and John J.

Craig, Auditor of Public Accounts of the Commonwealth of Kentucky, were made parties defendant to the bill on the ground that they are the authorities charged with the enforcement of the law attacked in the bill and were threatening to and would enforce same, unless enjoined and restrained by the Court from so doing; that failure on the part of appellee to comply with the law, make the reports and pay the tax required by the law would subject it to heavy penalties and would cast a cloud upon the title to its real estate.

The constitutionality of the act in question is assailed in the bill on the following grounds:

1. That so much of the law as imposes a tax of fifty cents upon each proof gallon of whiskey transported in bond out of Kentucky into another State is a tax or burden upon interstate commerce, in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States, and that the invalidity of this portion of the act renders the entire act invalid.

2. That the tax sought to be imposed by the act in question is in violation of Section 171 of the Constitution of the State of Kentucky, which provides that taxes upon all property subject to taxation within the territorial limits of the authority levying the tax shall be uniform. It is claimed in the bill that the tax is not uniform, but imposes double taxation upon whiskey—a burden not imposed upon any other property in the State of Kentucky.

3. That the law is not authorized by, and is in violation of, Section 181 of the Constitution of Kentucky, which authorizes the General Assembly to raise revenue by license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions or a special or excise tax.

4. That the act is in conflict with the National Prohibition Act passed October 28, 1919, pursuant to the Eighteenth Amendment to the Constitution of the United States, and especially to Title II of that act, which prescribes the terms and conditions upon which whiskey may be withdrawn from bonded warehouses or transported in bond from one State to another.

There is no allegation in the bill that unless the appellants are enjoined and restrained from attempting to enforce the law appellee would suffer great or irreparable injury, nor does the bill contain any allegation that appellee has no adequate remedy at law. An injunction is prayed for in the bill, enjoining appellants from in any manner enforcing or attempting to enforce against appellee, its officers, agents or employes, or any of them, the penalties prescribed for a violation of the law attacked in the bill, and from enforcing or attempting to enforce any lien upon any of the whiskey or the property of appellee for the purpose of enforcing collection of the tax.

In accordance with the provisions of Section 266 of the Judicial Code, after notice had been duly given, a motion was made in the District Court of

the United States for the Eastern District of Kentucky, before the Honorable A. C. Denison, Circuit Judge, and the Honorable A. M. J. Cochran and the Honorable J. E. Sater, District Judges, for an interlocutory injunction, restraining the officers of Kentucky from attempting to enforce any of the provisions of the law.

The appellants, Craig, Bradley and Dawson, appeared and filed a motion to dismiss appellee's bill because of lack of equity therein, and because the appellee (plaintiff below) had a full, complete and adequate remedy at law. The appellants filed a second motion to dismiss the bill of appellee, for the reason that same failed to state facts sufficient to support a cause of action against them, or any of them. Appellants also filed a motion to stay proceedings in the Federal Court, claiming that there was then pending in a Court of the State a suit involving the validity of the statute, in which suit a stay of proceedings under the statute had been granted.

With the record in this condition the motion of appellee for an interlocutory injunction was submitted to the three judges above named, who granted an interlocutory injunction. The opinion of the judges granting the interlocutory injunction is found on page 52 of the printed transcript of record. A somewhat similar case to the case at bar had theretofore originated in the District Court of the United States for the Western District of Kentucky, in which case The J. & A. Freiburg Company had se-

cured an interlocutory injunction against Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, and John J. Craig, Auditor of Public Accounts of the Commonwealth of Kentucky. That case is now pending in the Supreme Court of the United States, and is No. 582 on the Court's docket and set for argument on the same day as the case at bar. It will be observed that in the opinion of the lower Court in the case at bar, with certain exceptions, the opinion in the Freiburg case is adopted by the Court as its opinion in the case at bar. The Freiburg opinion will be found on page 53 of the transcript of record. The interlocutory injunction granted by the Court below in the case at bar is found on page 84 of the record. The appellants have prosecuted an appeal direct to this Court, under the provisions of Section 266 of the Judicial Code.

ASSIGNMENT OF ERRORS.

The formal assignment of errors by appellants will be found on page 88 of the printed record, and, briefly stated, the errors complained of are as follows:

1. The court erred in granting the interlocutory injunction herein.

2. The Court erred in holding that the act in question was unconstitutional, and especially in holding that it was void because of excessive penalties imposed for the violation thereof, and in holding that

it imposed a property tax and not a license or excise tax.

3. The court erred in refusing to stay proceedings herein pending the determination of the suit brought in the State court.

4. The Court erred in holding that the plaintiff had no adequate remedy at law, and in holding that imminent irreparable injury was threatened which justified the issual of an interlocutory injunction.

5. The court erred in refusing to sustain the defendants' motion to dismiss the bill in equity.

In this brief we will discuss the questions involved in a different order from that set out in the assignment of errors, as well as that followed by the court below in its opinion.

ALLEGATIONS IN THE BILL NOT SUFFICIENT TO CONFER JURISDICTION ON A COURT OF EQUITY.

An examination of the bill in this case shows that there is an utter failure on the part of the appellee to plead the necessary facts to give equity jurisdiction. No claim is made in the bill that great or irreparable injury will result to it from the enforcement of the law, nor is there any allegation in the bill that appellee has no adequate remedy at law to protect it in its rights asserted in the bill. This omission, we insist, is fatal to the case of appellee.

Section 267 of the Judicial Code, which is merely declaratory of the pre-existing rule, provides as follows:

> "Suits in equity shall not be sustained in any Court of the United States in any case where a plain, adequate and complete remedy may be had at law."

Where an adequate remedy at law exists, a court of equity has no jurisdiction. Rule 25 of the Rules of Practice for courts of equity of the United States, among other things, provides that a bill of complaint must contain a short and plain statement of the grounds upon which the Court's jurisdiction depends. From the foregoing, it would appear that a failure to plead that there existed no adequate remedy at law amounts to a failure to plead the necessary facts to confer jurisdiction on the Court. Plaintiff below, however, probably realized that it could not truthfully plead that there existed no plain, adequate and complete remedy at law. We insist that it had such a remedy.

PLAINTIFF BELOW HAS AN ADEQUATE REMEDY AT LAW.

The universal rule in the Federal Court is that a court of equity will not allow its injunction to issue to restrain officers from the collection of taxes, except where it may be necessary to protect the rights of citizens whose property is taxed and where there is no adequate remedy by the ordinary processes of the

law. The mere unconstitutionality or illegality of the law under which the tax is asserted is not sufficient to authorize the Federal Courts to use their injunctive processes to prevent the enforcement of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, produce irreparable injury, or, where the property of the complainant is real estate, throw a cloud upon the title to the property of complainant and that there is no adequate remedy at law, before the aid of a court of equity may be invoked.

Judicial Code, Sec. 267.
Dow v. City of Chicago, etc., 11 Wall. 108, 20 L. Ed. 65.
Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 L. Ed. 651.
Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273.
Allen v. Pullman Palace Car Co., 139 U. S. 658, 35 L. Ed. 303.
Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 53 L. Ed. 796.
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 57 L. Ed. 1288.
Arkansas Building & Loan Ass'n v. Madden, 175 U. S. 269, 44 L. Ed. 159.

With this statement of the law, which seems to be clearly established, it is important to determine if in the case at bar the appellee has an adequate remedy at law. Sections 162 and 163 of Kentucky Statutes are as follows:

"SEC. 162. TAXES WRONGFULLY COLLECTED REFUNDED. When it shall

appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.

SEC. 163. TIME IN WHICH TAXES MAY BE REFUNDED. He shall not draw his warrant for any money improperly paid for taxes, unless application be made in each case within two years from the time when such payment was made."

The Court of Appeals of Kentucky, in construing these two sections of the statute, has held that where the tax was paid directly to the Auditor, or directly into the State Treasury, and where no part of same was due, as when same is paid where there is no warrent in the statutory law of the State for the levy or collection of such taxes, or as when same is paid under a void or unenforceable statute, or through mistake or inadvertence of the taxpayer, it is the duty of the Auditor to refund the taxes so paid. Greene, Auditor, v. Taylor, 184 Ky. 739. The last case construing these two sections of Kentucky Statutes is the case of John J. Craig, Audjtor, v. Security Producing & Refining Company, 189 Ky. 565, decided by the Court of Appeals of Kentucky on November 16, 1920, and inasmuch as it is claimed in the opinion

of the lower Court that there is some confusion in the opinions of the Court of Appeals of Kentucky construing these two sections of the statute, we think it advisable to quote the opinion referred to, *supra*, in full. It is as follows:

> "The Security Producing and Refining Company, a corporation, was assessed by the State Tax Commission and paid into the State treasury a license tax $750.00, for the year 1918, and a like amount for the year 1919, under Sections 4189a and 4189c, Kentucky Statutes, and is now suing and is granted a mandamus by the lower court against the Auditor, requiring him to draw his warrant on the State treasury for the $1,500.-00 paid by it as tax when no license tax was due by said company at that time on this account. The Auditor is prosecuting this appeal. Section 162, Kentucky Statutes, provides 'when it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.' In construing this section of the statutes we held in Greene Auditor v. Taylor, 184 Ky. 739, 'that taxes voluntarily paid to counties, cities, towns and county officers, collecting the State's revenues and other collecting officers, can not be recovered although not due, and paid under a mistake of law. City of Louisville v. Anderson, 79

Ky. 334; L. & N. R. R. Co. v. Hopkins Co., 87 Ky. 605; L. & N. R. R. Co. v. Commonwealth, 89 Ky. 531.

"It is conceded that the Security Producing & Refining Company paid, through mistake of law, the taxes for 1918 and 1919 under Sections 4189a and 4189c, when it was required to and did pay to the State a license tax equal to one per centum of the market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one. When it became liable for the license tax under Section 4223c on its oil production, it was by the provisions of Section 4189a relieved of liability for a license tax upon its capital stock, but it paid both these taxes and now seeks to recover the sum paid as the latter.

"Appellee corporation insists that the attempted assessment of the taxes by the Tax Commission against the corporation was wholly without authority and, therefore, void.

"Fundamentally no tax can be levied or collected by the State, except under and by authority of legislative enactment. Money otherwise received by the State as taxes is unwarranted, and should be returned to the payor upon his compliance with the provisions of Section 163, Kentucky Statutes. It is admitted that the money sought to be recovered in this action, though paid as taxes, was not due as such, and the Security Company by mistake of law paid the same, though unwilling to do so, had it comprehended its legal rights. The attempted assessment made by the State Tax Commission was unwarranted and void because no such license tax was due at that time from the corporation. Money so paid as taxes should be returned to the payor on his timely application. The statutes, Section 162, which provides that when

it shall appear to the Auditor that money has been paid into the treasury as taxes when none were in fact due, *shall* be returned to the payor was intended to cover all such cases. Such improper payment of money into the treasury as taxes can not but appear to the Auditor by a glance at the statutes. He does not have to go into or review the attempted assessment made by the State Tax Commission, but need only to acquaint himself with the facts and look at the statutes imposing the tax on corporations to have it certainly appear to him that money has been paid into the treasury as taxes by the corporation when no such taxes were in fact due. When it does so appear to the auditor it is his duty to and he may be compelled by mandamus to issue his warrant on the treasury in repayment of the same. In every case where money is received as taxes when not authorized by statute or in violation thereof, the duty immediately devolves on the Auditor, upon proper application by the person paying the same, to issue his warrant on the treasury in repayment of said sum to the payor. It can appear to the Auditor that money has been paid into the treasury as taxes when none are due in at least two ways: (1) When there is no warrant in the statutory law of the State for the levy or collection of such taxes; (2) when the improper and unwarranted payment is made under a void or unenforceable statute or through mistake or inadvertence of the taxpayer, directly into the treasury or to the Auditor. In either of such case it can not fail to appear to the Auditor upon proper investigation that money has been paid into the treasury as taxes when no such taxes were in fact due, and it then becomes his duty to and he *shall* issue his warrant on the treasury for the repayment of the money so improperly paid in behalf

of the person who paid the same, provided proper application is made therefor. Manifestly the purpose of the Legislature in passing Section 162, *supra*, was to secure the return of all money paid into the treasury as taxes by taxpayers through mistake, inadvertence, misapprehension of the law, or under void or unenforceable statutes, for it expressly declares it to be the duty of the Auditor to issue his warrant in every case where it shall appear to him that the State holds money rightfully and in good conscience belonging to another.

"Following this rule, the Auditor should have promptly issued his warrant on the treasury for $1,500 in favor of appellee, Security Producing and Refining Company.

"The Auditor can not act arbitrarily in the payment of money, but will be held to strict accountability for all money paid out by him. In doubtful cases he should refuse payment until the question has been determined by the courts. But in every case, such as this, where it is made to appear to the Auditor that money has been paid into the treasury as taxes when no such taxes were in fact due, and demand has been made for its return within the time and in the manner provided by Section 163, Kentucky Statutes, he should promptly draw his warrant on the treasury and return to the payor the money thus received, but the Auditor is not required to go into or review assessments of taxing agencies to determine whether the payment is due or not.

"The cases of Bank of Commerce of Louisville v. Stone, 108 Ky. 427, and Greene, Auditor, v. Taylor, *supra*; Louisville City National Bank v. Coulter, 212 Ky. 584; Causey v. Bosworth, 169 Ky. 312; Louisville Gas Co. v. Bosworth, 169 Ky. 824, and all other cases announcing a simi-

bar rule, in so far as they conflict with the construction herein given Section 162, Kentucky Statutes, are expressly overruled. We can think of no reason why the State should not be required to live up to the same moral standards demanded of individuals and repay money received by it through mistake or inadvertence. Any other rule is unconscionable and is bad in morals if not actually dishonest. The State should not merely because it has the power to declare the law, take to itself money rightfully and in good conscience belonging to its citizens and taxpayers without just return. Such a statute would be both arbitrary and unjust and we can not conceive of the great law-making department of this Commonwealth contemplating such a thing by the enactment of Section 162, Kentucky Statutes. Such a purpose, if expressed in a statute would be inimical to all the past declared public policy of the State. The lower court did not err in awarding the writ of mandamus against the Auditor compelling him to draw his warrant on the treasury in favor of the plaintiff and appellee and the judgment is affirmed."

This case was decided by the Kentucky Court of Appeals after the lower Court granted the injunction in the case at bar, and it clears up any uncertainty in the meaning of Section 162, Kentucky Statutes, that may have theretofore existed, and it has been followed in the case of Craig, Auditor, v. Frankfort Distilling Co., decided by the Court of Appeals November 23, 1920.

Now, the appellee's contention in the case at bar is that the statute under which the tax is asserted

is unconstitutional and void. The Act attacked requires no action by any assessing board. By its terms the taxes are paid directly to the Auditor. The amount is figured by the taxpayer himself. Therefore, by no stretch of the imagination can it be said that the Auditor, in refunding taxes collected under the law attacked in the bill, would be required to review the action of any other assessing body. If the taxpayer pays these taxes under protest, then certainly under the authority of the case just quoted he has the right to demand of the Auditor a warrant for the refund of these taxes, and, upon the failure of the Auditor to refund same, the taxpayer may sue the Auditor in an action at law and obtain a mandamus compelling the Auditor to perform his duty and issue his warrant for the amount of taxes wrongfully collected. In such a suit the plaintiff could set up every objection to the validity of the statute which it has set up in the suit at bar, including the Federal questions. That being true, it would seem that the appellee in the case at bar has a full, complete and adequate remedy at law. Certainly its remedy under the Statutes of Kentucky, as interpreted in the case of Craig, Auditor, v. Security Producing & Refining Company, *supra,* is as adequate and complete as were the remedies held by this Court to be adequate in many of the adjudicated cases.

In order to compare the remedy afforded to appellee by the Statutes of Kentucky, under Sections 162 and 163, with the remedies which have in various

cases been held to be adequate by this Court, we deem it proper to examine the facts in a few of the cases heretofore passed upon by this Court.

One of the earliest and one of the leading cases on this question is the case of Dow v. City of Chicago, etc., 11 Wall. 108, 20 L. Ed. 65. In that case the aid of equity was invoked to prevent the collection of a tax levied by the city of Chicago on shares of the capital stock of the Union National Bank of Chicago owned by the complainant. The principal grounds alleged for relief were that the tax lacked uniformity; that the bank shares attempted to be taxed were owned by non-residents of the State and, therefore, had no taxable situs in Chicago, and that the assessment was made without any notice to the complainant. It was claimed, of course, that the taxing authorities were threatening to sell the shares of stock and work irreparable injury upon the complainant. Objection was made by the defendant to the bill on the ground that there was an adequate remedy at law. The Court, in discussing the adequacy of the remedy at law which the complainant had, used this language:

> "If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money; or he might have prosecuted either for his damage. No irreparable injury would have followed to him from its collection: Nor would he have been compelled to resort to a multiplicity of suits to de-

termine his rights. His entire claim might have been embraced in a single action."

The case of Indiana Manufacturing Company v. Koehne, 188 U. S. 681, 47 L. Ed. 651, was a suit seeking to enjoin the collection of certain taxes which had been assessed against the complainant, a corporation of Indiana. It was charged that such taxes, or a greater part of them, were illegal; that the law was in violation of the Federal Constitution, and that the taxing authorities were threatening to levy upon the property of the complainant for the purpose of collecting the tax; that its wrongful collection would lead to a multiplicity of suits, and that irreparable injury would be sustained by the complainant if the law were enforced against it. It also appears from the opinion in this case that the county authorities collected, not only the county revenue, but acted also as the collecting agency for the State's part of the tax. Under the laws of Indiana it seems that Indiana corporations are required to make a report to the assessor, showing the property of the corporation subject to the tax, and the assessor delivers such report to the county auditor, who, in turn, delivers it to a board of review, and this board values and assesses the capital stock and franchises and other property of the company for the purposes of taxation, under the law. From the action of this board the corporation assessed has the right of appeal to the State Tax Commission. Upon this appeal the State Tax Commission has the right to decide as to

the assessment, and to make such an assessment, increasing or reducing it as it may decide proper, and the Auditor then certifies the action of this board to the several counties, after which the collection is made by the proper county official.

Another law of the State of Indiana provides that in case any person or corporation conceives that he should not have paid a tax, or has been erroneously assessed, he may appear before the Board of Commissioners of the county and establish by proper proof that he has paid taxes which were wrongfully assessed against him, and it is thereby made the duty of the board to order the amount so proven to have been wrongfully collected to be refunded to the payer from the county treasury, so far as the same was paid for county taxes, and, as to that portion of same which was paid to the State, it is made the duty of the county board to certify to the Auditor the amount so proven to have been wrongfully collected, and the Auditor is then required to direct the treasurer of the State to refund same. Upon the failure of the authorities to comply with this provision of the law, the taxpayer is then given his remedy by suit.

In this case the defendant moved to dismiss the bill for want of equity, on the ground that the statute furnished to the complainant an adequate remedy at law. The Supreme Court of the United States upheld this contention and held that under this state of facts the complainant had an adequate remedy at law, and sustained the lower Court in refusing to

grant the injunction. In this case the Court held that it wasn't even necessary, in order to recover the tax back which had been paid to the State, to sue the State Auditor at all; that, inasmuch as the county was made the collecting agency for the State, the suit could be brought directly against the county, and the county could not be heard to defend upon the ground that the money had already been paid over to the State, provided notice had theretofore been given to the county that the complainant regarded the tax as illegally collected.

In the case of Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273, there was involved an Act of the Legislature of Tennessee, imposing license taxes on an express company. The claim was made that it was unconstitutional; that it interfered with interstate commerce, and was therefore violative of the Federal Constitution; that its enforcement would subject it to having its property seized by the sheriff and would greatly embarrass the company in the conduct of its interstate business, and the public served by it would be subjected to great inconvenience, and the complainant would suffer irreparable injury by the enforcement of the law. To this bill the defendants demurred on the ground that the complainant had an adequate remedy at law, and the opinion discloses that the law of Tennessee provided that in cases where the taxpayer claimed he did not owe the taxes, he might pay under protest and then sue to recover back. The complainant claimed that this was

not an adequate remedy at law. The Supreme Court, however, held that under the law of Tennessee permitting a recovery back, the complainant had a full and adequate remedy at law, and denied the injunction.

In the case of Allen v. Pullman Palace Car Company, 139 U. S. 658, 35 L. Ed. 303, the complainants were attacking as unconstitutional a license tax which they claimed placed a burden on interstate commerce, and because they claimed it denied the taxpayer the equal protection of the law; and because it was void for repugnancy to the Constitution of the State and the Constitution of the United States. It was also alleged in the bill that in an effort to enforce collection of the taxes against the complainant, the Pullman Palace Car Company, the sheriff of the county had seized and attached a certain sleeping-car belonging to the company, and had advertised and threatened to sell same, and was threatening to seize and sell other cars. The allegation was made that this car would not sell at a forced sale for what it was worth, and, in addition thereto, the seizure of this car and the threatened seizure of other cars would hamper the company in its interstate commerce, and, in addition thereto, would destroy its power to be of adequate service to its patrons, and it would thereby be rendered liable for a multiplicity of suits by its patrons.

It would seem that a case of irreparable injury was as strongly made out as could possibly be made

under the circumstances. No question was made in the lower court at all of the power of the court to grant the injunction and the lower court granted such an injunction. The question of the power of the court to grant the injunction was raised for the first time in the Supreme Court, and, notwithstanding the fact that it was raised for the first time in the Supreme Court, this court held that the pleadings themselves showed that the complainant was not entitled to the relief sought, and reversed the case on the ground that equity should not have granted the injunction under the circumstances, as it appeared that under the law of Tennessee the company had an adequate remedy at law to recover the value of the cars taken, and had it wished to avoid the sale an easy and adequate method was furnished by which it could have avoided the sale and still have sustained no loss. All it had to do was to pay the tax under protest, and then sue to recover same back.

In the case of Boise Artesian Hot & Cold Water Company v. Boise City, 213 U. S. 276, 53 L. Ed. 796, the court had under consideration the legality of an ordinance of Boise City, Idaho, which imposed a license of three hundred dollars per month on a certain water company which occupied the streets and alleys of the city with its pipes, under a franchise theretofore acquired by it. The bill of complaint attacked the ordinance on the ground that it was discriminatory, and that like licenses had not been exacted of other corporations; that the city was threat-

ening, unless the license was paid, to remove the pipes and other waterworks from the city; that it had brought suits in the State courts to recover the amounts alleged to be already due on account of the license, and would bring other suits, thereby resulting in a multiplicity of suits, and that the ordinance had cast a cloud upon the company's franchise, and thereby depreciated the value of its property, impaired its credits and confiscated its property; that the ordinance impaired the obligation of its contract theretofore made with the city, and that the enforcement of the ordinance would take the company's property without due process of law and abridge its privileges granted by the Fourteenth Amendment, and that the ordinance violated the Constitution and laws of the State. An objection was interposed to the suit on the ground that the plaintiff had an adequate remedy at law, and the Court, by Mr. Justice Moody, sustaining this contention, used this language:

> "It has been held uniformly that the illegality or unconstitutionality of a State or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity. And the rule applies as well where the right asserted is by way of defense. Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 623, 20 L. Ed. 501, 503.

"In order to give equity jurisdiction, there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the remedy by injunction can be awarded. The leading case on the subject is Dow v. Chicago, 11 Wall. 108, 20 L. Ed. 65. In that case the plaintiff sought to enjoin the collection of a tax levied upon shares of the capital stock of a national bank on the ground that the levy was unconstitutional under the State law, and that the property was not within the jurisdiction of the State. This court declined to pass upon the validity of the tax, saying, through Mr. Justice Field (p. 109):

" 'The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.' * * *"

In the case of Singer Sewing Machine Company v. Benedict, 229 U. S. 481, 57 L. Ed. 1288, the court quoted with approval the rule announced in the last case, *supra*. The Singer Sewing Machine Company case, *supra*, was a case where a New Jersey corporation was seeking to enjoin the collection of taxes

levied by the city and county of Denver, in the State of Colorado, which taxes the company was claiming were not due, on the ground that it had no notice of the assessment. The bill also contained allegations that the company had no property within the city and county other than that already returned and paid upon by it, and that the additional assessment and tax levied thereon were illegal, and that to enforce the collection of such taxes would be violative of designated provisions of the Constitution of the United States. A demurrer was filed to the bill, on the ground that the plaintiff had an adequate remedy at law. It appears from the opinion that Colorado had a law providing that whenever illegal taxes were collected, the county commissioners should make a refund of same to the taxpayer, and the taxpayer is given a right, upon the failure of the county commissioner to make the refund, to enforce his rights in an action at law. The court upheld the contention of defendant and denied the injunction, holding that the statute which gave the right to the taxpayer to sue to recover the taxes erroneously paid was a full and adequate remedy at law.

In the case of Arkansas Building & Loan Association v. Madden, 175 U. S. 269, 44 L. Ed. 159, the building and loan association was contesting in a court of equity the collection of a license tax by the State of Texas. It was claimed that great and irreparable injury would be suffered by the complainant if the tax were permitted to be collected, and that

it would be subjected to a multiplicity of suits unless the enforcement of the law was enjoined. The court, however, Chief Justice Fuller writing the opinion, held that inasmuch as there was no law of Texas prohibiting it, the tax could be paid by the complainant under protest to the State officer whose duty it was to collect the tax, and that then suit at law might be brought to collect this tax back from the officer collecting same, and, inasmuch as this remedy existed, it was full, complete and adequate, and that equity should not issue an injunction to restrain the enforcement of the statute.

It is suggested in the opinion of the court below that the case of *Ex parte* Young, 209 U. S. 123, 52 L. Ed. 714, is authority for granting the injunction in the case at bar. We do not so understand the Young case. In that case was involved the validity of what is known as the "Minnesota Rate Laws." That State had passed certain laws prescribing certain rates as maximum rates for passengers and certain rates as maximum rates for commodities. Heavy penalties, including penitentiary sentences, were denounced against those violating the law and charging higher rates than the maximum rates fixed by the statute. An injunction was granted, preventing the Attorney General from prosecuting complainants for a violation of the law, it being claimed that unless such injunction was granted a multiplicity of suits would result, great and irreparable injury would be suffered by the company, and to at-

tempt to test the validity of the law in the courts would subject those testing same to heavy penalties and probable confinement in the penitentiary, if the law should be ultimately held to be good. The Attorney General disregarded this injunction, and was fined and placed in the custody of the marshal, and the case came up on a *habeas corpus* proceeding. In that case the complainants were confronted with this situation: They must either refuse to comply with the law and thereby take a chance of going to the penitentiary and being fined if the law should be held good or they might comply with the law. In event they complied with the law, they would be absolutely without remedy to recover back the losses they sustained by operating under what was claimed to be destructively low rates, in event it should be ultimately determined in a suit that the law fixing the rates was illegal. So it clearly appeared in that case, not only that there was no adequate remedy at law available to complainants, but that they would suffer irreparable injury, no part of which could be recovered unless a temporary injunction was granted. Such is not the case here. No irreparable injury or damage will be sustained by the appellee in this case by complying with the law and then seeking his remedy under Section 162 of Kentucky Statutes. Appellee is not confronted with the danger of having great penalties inflicted upon it, nor is it confronted with the danger or chance of irreparable loss should it comply with the law and pay the tax.

Appellee can avoid all danger of penalties and at the same time protect itself in whatever rights it may have. All appellee has to do is to pay the tax and then make a request to the Auditor to refund it. If the Auditor refuses to refund, under the authorities above referred to a suit may be brought against him to compel a refund. There would be no necessity for more than one suit, irrespective of how many different withdrawals or removals the appellee may desire to make. The matter can be tested in one suit, and while that suit is pending, should it desire to remove other whiskey upon which the tax is due, it could pay the tax and make a demand for the refund, and the matter could be held in abeyance after such demand until the suit involving the right to recover the tax has been decided. Should the one suit be decided in favor of the taxpayer, then under the authority of the case of Craig, Auditor, v. Security Producing & Refining Company, *supra*, it would be the Auditor's duty to promptly refund all payments of taxes made subsequent to the bringing of the suit, and the assumption is that the Auditor would do his plain duty and make such refund. Appellee does not have to sue any other taxing authority than the Auditor, because all the tax collected under the law in question is for State purposes. No question of having to sue the county or the city or the school district is involved, because they secure no part of the tax. The cases hereinbefore cited, and especially the case of Dow v. City of Chicago, *supra*, and Allen v. Pullman

Palace Car Company, *supra*, are conclusive against the complainant's plea of irreparable injury, as these cases hold that where the statute provides a method of recovering the tax back from the collecting authority, no claim of irreparable injury will be sustained. Nor can the appellee be heard to complain on the ground that the tax imposed by the law casts a cloud on its real estate. Section 162 of the Kentucky Statutes, above referred to, furnishes to appellee ample means of releasing its property from lien. All it has to do is to pay the tax and then any cloud upon the title to its real estate is removed.

In the case of Union Pacific Railroad Company v. Weld County, 247 U. S. 282, the court used this language:

> "And it also is immaterial that the taxes were made a lien on the company's real property, for the lien would be effectually removed by paying them and suing to recover back."

See also Allen v. Pullman Palace Car Company, 139 U. S. 658, and Arkansas Building & Loan Association v. Madden, 175 U. S. 269, 44 L. Ed. 159.

In the light of these cases we submit that the complainant has a full, complete and adequate remedy at law and that it should be remitted to this remedy. That it may be more convenient to test the validity of the law in question by an equity proceeding is no justification for such proceeding where an adequate remedy at law exists. As Chief Justice Fuller ex-

pressed it in the case of Arkansas Building & Loan Association v. Madden, 175 U. S. 269, 44 L. Ed. 159:

> "It is quite possible that in cases of this sort the validity of a law may be more conveniently tested by the party denying it by a bill in equity than by an action at law, but considerations of that character, while they may explain, do not justify the resort to that mode of proceeding."

THE PROCEEDING SHOULD HAVE BEEN ABATED.

Another reason why the temporary injunction should not have been granted is that there was at the time the injunction was granted, and there is now pending in the Franklin County Circuit Court of Kentucky, a court which has jurisdiction to enforce the statute, a suit to test the validity of the law attacked in the bill in this case. In this State suit there was a stay of proceedings, staying the Auditor and Attorney General from proceeding under the law. The record of this proceeding in the State Court is found on pages 24 to 49 of the Transcript of the Record. That the Franklin Circuit Court has jurisdiction to enforce the law in question, we assume counsel for appellee will not deny. We think the same rule which prohibits the Federal Court from using its injunctive process to stay the collection of a State tax, where there is an adequate remedy at law, holds good also in the State courts; but whether it does or does not, the temporary restraining order issued by the Clerk of the Franklin Circuit Court, staying the

hands of the appellants herein is binding upon them until the restraining order is set aside. Under the law of Kentucky, it remains in full force and effect until same has been dissolved by a circuit judge upon a hearing.

Section 266 of the Judicial Code, among other things, provides as follows:

> "It is further provided that if before the final hearing of such application, a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

We do not see how it can be contended that this law means other than that whenever a suit to test the validity of a law has been brought in a State court having jurisdiction to enforce the law, and a stay of proceedings has been had in that suit, then the Federal court must stay its hand until a final determination of the case in the State court. The words, "to enforce such statute or order," by every rule of grammatical construction must be held to modify the word "jurisdiction."

Counsel for appellee contend that the suit must have been brought by the State to enforce the law. Such a contention leads to an absurdity, for the rea-

son that if the State brings a suit to enforce the law, by no possible means could a stay be had by the plaintiff in that suit. Certainly the State could not take a stay and at the same time seek to enforce the law. There would be no necessity for the defendant to have a stay, because in his answer he could defend upon all the propositions relied upon to make the law invalid, and, of course, it could not be enforced against him until those questions were finally determined. So it seems that portion of Section 266 above quoted must mean that whenever any one attacks the validity of a law in a State court, and in that attack, by injunction or restraining order, stays the hands of those charged with the enforcement of the law, that fact of itself automatically, when made known to the Federal court, stays the hand of the Federal court.

THE TAX IMPOSED BY THE ACT IN QUESTION IS AN OCCUPATIONAL OR EXCISE TAX, AND JUSTIFIED UNDER SECTION 181 OF THE CONSTITUTION OF KENTUCKY.

Section 181 of the Constitution of Kentucky is as follows:

> "The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment

of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions"

This provision of the Constitution confers on the Legislature the right to put a license tax on any business for the purpose of raising revenue, or to impose a special or excise tax for that purpose. Counsel for appellee in this case are contending that the tax in question is not an occupational or excise tax, but is a tax on property; or, if not a tax upon property, that it is an arbitrary attempt on the part of the Legislature to single out and define as a business something that was not contemplated under Section 181 of the Constitution should be treated as a business. The tax is not an *ad valorem* tax, and the Court of Appeals of Kentucky has repeatedly held that such a tax is not a property tax. The law in question in this case is almost an exact duplicate of an act passed by the special session of the General Assembly in 1917, which imposes a license tax of two cents per gallon upon manufacturers of distilled spirits and the owners of warehouses in which such distilled spirits were stored, same to be paid upon removal from bond or upon transfer under bond from one warehouse to another. The language of the Act of 1917, in so far as applicable, is as follows:

"Every corporation, association, company, co-partnership or individual engaged in the business or occupation of manufacturing distilled spirits known as whiskey or brandy or other species of double stamped spirits in this State, and every owner or proprietor of a bonded warehouse in this State in which such spirits are stored, shall, in addition to the taxes now imposed by law, pay to the Commonwealth of Kentucky a license tax of two cents on every proof gallon of such distilled spirits which is liable for tax to the Federal government, as shown by its official records."

This act was repealed by the law attacked in this bill. However, the Court of Appeals of Kentucky, in the case of Greene, Auditor v. Taylor & Sons, 184 Ky. 739, held that this was a license or occupational tax. The Legislature in 1917 also imposed upon oil producers a tax equal to one per cent of the market value of all crude petroleum produced in Kentucky, which law made the pipe line companies handling such oil the collecting agencies for the State and responsible for the tax. The Court of Appeals of Kentucky, in the case of Raydure v. Board of Supervisors of Estill County, 183 Ky. 84, held that this tax was an occupational tax. For many years we have had in Kentucky a law imposing a tax on persons engaged in rectifying whiskey, the tax being one and one-fourth cents upon every wine gallon of whiskey compounded and rectified by the persons embraced within the provisions of the act The Supreme Court of the United States in the case of Brown-Forman

Company v. Kentucky, 217 U. S. 563, 54 L. Ed. 883, held that this was an occupational tax. See also: American Manufacturing Co. v. City of St. Louis, 250 U. S. 459. So that it would seem that there can be no question that the tax complained of in the petition in this case is an occupational or an excise tax.

Nor do we think that the inapt use of the word "annual" appearing in the title and in Section 1 of the act makes the tax in effect an *ad valorem* tax. The use of this word "annual" may lead to the suggestion that the law imposes a tax of fifty cents per proof gallon for each proof gallon of spirits stored in a bonded warehouse for each year same may remain in such warehouse. However, there is nowhere in the act the slightest intimation that the Legislature intended that this tax should be a cumulative one, piling up at the rate of fifty cents per year for each year that a gallon of whiskey remains in a bonded warehouse. If the word "annual" has any meaning in the act at all, it is merely intended to express the purpose of the Legislature that for the privilege of doing business each year, there should be imposed on the persons embraced in the terms of the act an annual license tax, which would be the amount produced by multiplying the number of gallons removed from bond in that year by fifty cents per gallon. In that sense it is an annual tax, but every provision of the act belies any intent on the part of the Legislature that the tax should be cumulative and figured by the number of years the whiskey which

stands in lien for the tax remains in a bonded warehouse. Had the Legislature intended that this tax should be a cumulative one, to be determined by the number of years the whiskey remained in a bonded warehouse, it would certainly have provided some machinery in the act by which the Auditor and those charged with the enforcement of the act would be enabled to know how many years each particular gallon of whiskey removed from bond had been in bond and subject to the tax imposed. No such provisions are made anywhere in the act. The reports made each month are not required to show the length of time the whiskey removed from bonded warehouses had remained in bond and subject to the tax. Surely, had the Legislature intended that this tax should pile up at the rate of fifty cents per gallon per year, some requirement providing for this important and necessary information would have been embraced in the act. Section 3 of the act clearly shows the real basis upon which the tax is to be collected. It simply imposes a license tax, to be measured by the number of proof gallons removed by any person affected by the same from a bonded warehouse or transferred under bond to a bonded warehouse out of Kentucky. The number of gallons is the criterion by which to calculate the amount of tax due by any particular individual affected by the law. The authorities charged with the enforcement of the law do not regard it as a cumulative tax, and no person is required under the terms of the law to pay a tax of fifty cents

per proof gallon for each year a gallon of whiskey may remain in a bonded warehouse. One payment of fifty cents per proof gallon, due and payable upon its removal from a bonded warehouse, or upon its transfer under bond out of the State, fully satisfies the provisions of the law.

It may be suggested by counsel for appellee that the Legislature has singled out as an occupation in the law in question the single business of owning and storing intoxicating spirits in bonded warehouses and removing same therefrom, and that such is not an occupation within the meaning of Section 181 of the Constitution. We think, however, that this construction does violence to the real meaning of the law. While the law may be inaptly drawn and expressed, a reading of all of its provisions clearly indicates that it was the purpose of the Legislature to tax one continuous business, beginning with the distiller and ending with the removal of the distilled spirits from the bonded warehouse in which the distiller stored such spirits. We do not see how it can be successfully contended that the distiller under this act must pay a tax of fifty cents per gallon for manufacturing, and in addition to this tax the person who stores same in a bonded warehouse must pay another tax, and the person who removes same from the bonded warehouse must pay a third tax. The evident purpose of the Legislature was that this entire business of distilling, owning and storing and removing from bonded warehouses

should bear only the one tax as an occupational tax. The fact that a portion of the acts constituting the business had already been performed at the date of the passage of the law should in no wise affect the validity of the act. It is true as to most of the liquor reached by this tax that the act of distilling same had been performed and completed prior to the passage of the act, but it was an act subject to an occupational tax at the time the distilling was done, and the mere fact that the law may appear in a sense retroactive as to that portion of the business in no wise invalidates same, the inhibition against *ex post facto* laws applying only to criminal statutes. There is no provision in the Constitution of Kentucky nor of the United States which forbids the enactment of retrospective legislation, so long as such legislation is not an *ex post facto* statute within the meaning of the Constitution, and so long as same does not impair the obligation of a contract or interfere with vested rights.

Locke v. City of New Orleans, 4 Wall. 172, 18 L. Ed. 334.
League v. Texas, 184 U. S. 156, 46 L. Ed. 478.
Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137.
Cooley on Taxation, 3rd Edition, Vol. 1, 492.
Billings v. United States, 232 U. S. 261, 58 L. Ed. 596.

It will be observed that Section 2 of the act makes the warehouseman in whose place the liquors are stored the collecting agency of the State, and he is

required to make the reports, showing the amount of tax due on each reporting day. No tax is required of the distiller at the time he distills his liquor and places it in a bonded warehouse. No separate tax is required of the owner and storer of liquor as long as it remains in the bonded warehouse. It is only when the liquor is removed from bond or transferred under bond out of the State that the tax becomes due, and an examination of Section 3 of the act discloses that only one tax for the entire business is to be collected, and this is measured at the rate of fifty cents for each proof gallon of liquor which is removed from bond or transferred under bond out of the State. The evident purpose of the act was to impose a tax on the one business of manufacturing distilled spirits and the preparation of same for market, and the intent of the Legislature was to make each and all of the agencies engaged in the manufacture and preparation and the handling of this liquor responsible for this one tax, the apportionment of the tax between these various agencies being left to the agencies themselves.

As a further inducement to the belief that the Legislature was attempting to impose an occupational tax on the one business—manufacturing distilled spirits and the preparation of same for market—we invite the court's attention to Section 8 of the act in question, which refers to persons "engaged in the business covered and licensed by this act." It would seem from this language in Section 8 that the Legislature regarded the business attempted

to be taxed as one business, and not as a series of occupations. Furthermore, the construction placed on the Act of 1917, which the Act in question displaces, is persuasive of our contention that the purpose was to tax only the one business. While the Act of 1917 provided in express terms that every corporation, association, company, etc., engaged in the business or occupation of manufacturing distilled spirits, and every owner or proprietor of a bonded warehouse in this State in which such spirits are stored, should pay a license tax of two cents on every proof gallon of such distilled spirits, the uniform construction placed upon this act by the authorities charged with its enforcement was that it imposed only one tax on the one business of distilling and storing liquors in a bonded warehouse. During all the period this law was in effect, no claim was made by the authorities charged with its enforcement that the Act of 1917 imposed a tax on the business of distilling and a separate tax on the warehouseman.

Even should the Court be of opinion, however, that our construction of this act is erroneous, and that it is not a tax on the one occupation of distilling, owning and storing in bonded warehouses, but that the Legislature was undertaking to tax the business of owning and storing in bonded warehouses as a separate business, we think the law is justified under Section 181 of the State Constitution. Persons who store liquor in bonded warehouses do so for a certain definite purpose. One is to permit it to age, so that

it may be bottled in bond and then sold to the trade. To do this, under government regulations, it must remain in storage and age for four years. This is undoubtedly doing something which is a necessary part of the business of manufacturing and selling liquor. Another purpose in storing liquor in a bonded warehouse is that which animates all persons who store in a public warehouse, viz., to have some person in charge and in keeping of the goods and responsible therefor. Another reason for the storage is to avoid payment of government taxes until a sale has been secured for the product stored. It would seem that a person engaged in the liquor business to any extent would undoubtedly have to engage in these particular acts in order to so engage in business.

The Legislature of Kentucky, under the Constitution of the State, has the undoubted right to single out a business and impose an occupational tax on such business, and unless the definition and selection of the business made by the Legislature is so arbitrary and capricious as to be unreasonable, the courts are not justified in declaring the act of the Legislature illegal.

In the case of Female Academy v. Sutherland, 116 Ill. Reports (Freeman), 375, the court was called upon to define the meaning of the words "doing business in this State." The court used this language:

> "Receiving lands in this State by devise, and the assertion in the State of ownership over them

> we regard a sufficient doing business in this State to bring appellant within the purview of this language of the section."

In the case of Pennsylvania v. Bauerle, 143 Ill. Reports, 459, the court, in construing the same statute referred to in the case above, used this language:

> "So here, receiving the land adjoining Chicago by devise, with power to sell, and dispose of same, and the power to lease it and to collect the rents and profits therefrom, and the assertion in this State of the ownership of said land and assuming to sell and convey it, and bringing suits in the courts of this State in respect to said land and such alleged ownership, and for the enforcement of contracts in regard to same, must be held to be doing business in this State within the purview of this section."

While it is true that the two opinions just referred to were not construing a statute imposing a tax on doing business, still they illustrate how far the courts have gone in holding that certain acts constituted doing business within the State.

The case of Greene v. Kentenia Coal Corporation, 175 Ky. 661, was a case in which the question involved was the right of the Commonwealth to collect from a company which merely owned land in Kentucky a license tax under the provisions of Section 4189c and 4189d, Kentucky Statutes.

These sections of the statute impose a license tax of fifty cents on each one thousand dollars of the authorized capital stock of corporations represented by property owned and business transacted in Ken-

tucky. The Kentenia Coal Corporation claimed that it was not liable for the tax because it was doing no business in Kentucky, but was merely owning and holding land. The Court was called upon to pass upon the question whether or not owning land in Kentucky was doing business in this State. It was contended by the company that merely owning land was not doing business, but that it would have to be putting the land to some use. The Court, in answer to that contention, used this language:

> "But we do not construe that phrase to be confined to such a narrow meaning. When plaintiff invested its capital in the coal and timber land which it purchased in this State, it did so for one of two purposes—that of speculation by holding the land until it naturally increased in price, or to reap a profit from it by operating it either in the way of cultivation, mining, getting timber from it, or otherwise, so as to make it profitable. It avers in its pleading that it is doing neither of the latter, and therefore it is not doing business in this State. But, according to our conception, the land need not be in actual use in order to constitute *doing business.* The average speculator in land (and there are many of them) if asked in what business he was engaged would answer, 'speculating in land.'
>
> "One of the definitions of business given by Mr. Webster is 'buying and selling,' and when one, either as an individual or corporation, puts his money into land rather than other investments, his act is necessarily a choice between the various means open to him by which he may make his money yield him a profit.
>
> "One of the definitions of 'invest' as given

by Mr. Webster, is 'To lay out (money or capital) in business with the view of obtaining income or profit,' and to employ capital by investing it in land and not using the land is, according to our view, doing business within the sense of that term as used in the statute providing for the tax sought to be enjoined. Furthermore, a constituent part of the legal definition given by us in the case of Larkin v. Commonwealth, 172 Ky. 106, 189 S. W. 3, of 'doing business' is: 'In other words, business does not mean dry goods, nor cash, nor iron rails and coaches. Business is not these lifeless and dead things, but the activities in which they are employed. When in motion, then the owners are said to be in business.'

"As seen, plaintiff employed its capital by investing it in real estate situated within this State. It then put its capital in motion, and as long as it remains so invested it is doing business for its owner."

From the authorities quoted, we therefore think that, viewing the law either as imposing one tax on the entire business of distilling, storing in bonded warehouses and removing liquors therefrom, or as imposing a separate tax on each of said activities, it is fully justified under Section 181 of the Constitution of Kentucky.

THE ACT IN QUESTION DOES NOT VIOLATE SECTION 171 OF THE CONSTITUTION OF KENTUCKY.

We think the contention of the appellee that the act in question violates Section 171 of the Constitution of Kentucky, which requires uniformity of taxation, is without any merit whatever. As before stated, and as shown by the authorities quoted, this is not a property tax, but purely an occupational tax or an excise tax. Section 171 of the Constitution of Kentucky is as follows:

> "The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

It will thus be seen that the uniformity required by Section ~~117~~ 171 of the Constitution is uniformity in *ad valorem* taxation, and not in license taxation. One of the most instructive cases on the question as to whether or not Section 171 of the Constitution of Kentucky, requiring uniformity of taxation, applies to license taxes levied under Section 181 of the Constitution of Kentucky is the case of Hager, Auditor, v. Walker, 128 Ky., page 1. In this case the Court used this language:

"We do not agree with counsel for appellee that the direction in Section 171 that 'Taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax' applies directly or specifically to the license fees that may be levied on franchises, stock used for breeding purposes, trades, occupations and professions mentioned in Section 181. Yet it is entitled to serious consideration as indicating the purpose that all laws imposing taxes shall operate in a uniform manner, to the end that no favoritism can be shown or discrimination be practiced. Section 171 authorizes the imposition of an *ad valorem* tax upon all the property in the State for State purposes, and in counties, cities, towns and taxing districts for local purposes. This *ad valorem property tax*, whether imposed or levied for State, county, municipal or local purposes, must be uniform within the territory in which it is imposed."

In the same opinion the Court, in discussing the authority to impose license taxes, under Section 181 of the Constitution of Kentucky, used this language:

"The authority to tax under this section is as far-reaching and as sweeping as language can make it. It would be difficult to find three words that cover wider fields of employment than 'trades,' 'occupations' and 'professions.' Under its authority to tax them the General Assembly has the power and the right to tax every business and every individual in the State—the merchant, trader and banker; the lawyer, minister and doctor; the mechanic and farmer. Indeed, it would be difficult to mention a person who has not some trade, occupation or profession, and if he has, the authority to tax him is granted and this

without respect to the nature or character of the trade, occupation or profession, or whether it be humble, or great, large or small. Nor does the Constitution undertake to place any limitation upon the amount of tax that may be imposed, although it may be conceded that if it shall be so unreasonable or arbitrary as to amount to a confiscation of property or a denial of the right to engage in a particular trade, occupation or profession, the courts would interpose to protect the class of persons affected from this oppressive burden, on the ground that it was a violation of the principles recognized and established in the Bill of Rights, declaring that all men have the right of seeking and pursuing their safety and happiness and the right of acquiring and protecting property."

Further along in the same opinion the Court used this language:

"We believe that it is competent for the Legislature under this section by general laws, for State purposes, as well as by a general law delegating the power to the municipalities mentioned, to divide trades, occupations and professions into classes and to impose a different license fee upon each class that the trade, occupation or profession may fairly and reasonably be divided into. To illustrate: Dealers in hardware might be divided into wholesale and retail dealers. And trades, occupations and professions may be further classified according to the volume of business done by them. Nor is the General Assembly, either by general law for State purposes or general law in aid of or for the benefit of municipalities, required to impose the license fees that *may be* levied upon all trades, occupations and professions. *Any one or*

more trades, occupations and professions may be singled out for taxation, and all the others not thus selected be exempted. It will thus be seen that according to our construction of this section it is susceptible of wide and varying application." (The italics used are ours.)

This opinion establishes beyond any sort of question that the uniformity of taxation referred to in Section 171 of the Constitution of Kentucky is taxation upon property, and not license taxation upon trades and occupations. It also establishes beyond any sort of question that the Legislature may not only single out and tax one occupation and fail and refuse to tax all other occupations, but it even can go to the extent of classifying the persons engaged in the one occupation which is taxed, and if that classification is along reasonable and just lines, it will be sustained.

Therefore, the contention of the appellee that the law imposes unequal taxation and violates Section 171 of the Constitution of Kentucky is without merit. There is only one ground upon which it can be held that the act violates Section 171 of the Constitution of Kentucky, and that is for the Court to hold that it is a property tax and not an occupational tax. For the Court to reach such a conclusion as this would be to go at variance with the plainly expressed purpose and intention of the Legislature.

The opinion in the case of Hager v. Walker, *supra,* answers with equal force the contention of the appellee that the act is discriminatory in its nature

and adds a greater burden on whiskey than on other personal property, as well as the contention of the appellee that it adds a bigger burden on the business taxed, if it be an occupational tax, than on other businesses of like character. Other cases following the case of Hager v. Walker, *supra,* are:

Gordon v. City of Louisville, 138 Ky. 444.
City of Louisville v. Sagalowski & Son, 136 Ky. 328.
Strater Bros. Tobacco Co. v. Commonwealth, 117 Ky. 603.
Weyman v. City of Newport, 153 Ky. 490.

DO THE PENALTIES FOR VIOLATION OF THE ACT IN QUESTION MAKE IT INVALID?

The bill in this case does not specifically raise the question as to whether or not the penalties provided for in the law for a violation of its terms make the law invalid by reason of being excessive. The lower Court, however, in this case adopted the opinion rendered by the lower Court in the Western District of Kentucky in case No. 582, now pending in this Court, wherein Charles I. Dawson, Attorney General, *et al.,* are the appellants and The J. & A. Freiburg Company, Incorporated, is the appellee; and one of the main reasons given in the opinion of the lower Court in the last case above referred to for holding the law invalid was that the penalties provided for in the law are so excessive as to render the whole act invalid. For this reason we wish to briefly discuss this question.

As stated at the outset in this brief, we think that the appellee is afforded an adequate and safe method of testing the law under Section 162 of Kentucky Statutes, without incurring any risk either of penalties or loss. It is the universal rule that where a means is furnished by which a law may be safely tested without the person testing same incurring the penalties, in event he loses in the test, substantial penalties may be imposed. We think it safe to say that an act otherwise valid has never been held invalid on account of penalties alone, unless there exists the further fact that the person subject to the provisions of the law is afforded no means of testing same without incurring the risk of having to pay the penalties.

St. Louis, I. M. & S. Railway Co. v. Williams, *et al.*, 40 Supreme Court Rep. 71.
Waddy v. Southern Railway Co., 235 U. S. 67, 59 L. Ed. 405.
Gulf, Colorado & Santa Fe Railway Co. v. State of Texas, 246 U. S. 58, 62 L. Ed. 574.

Assuming that Section 162 of the statutes of Kentucky, hereinbefore referred to, affords an adequate and safe means of testing the act in question without incurring the risk of the penalties, it can not be said that the penalties for a violation of the act are excessive and unreasonable. The court must look to the object intended to be accomplished by the imposition of the penalties. It is evident that the act intended to make the liquor itself part security for the collec-

tion of the tax imposed by the act, and unless the penalties were heavy, the temptation would be very strong for the owners of large quantities of liquor stored in bonded warehouses in Kentucky to remove same from such warehouses between two reporting dates, without the payment of the tax, and all that the State would have left to secure it in the tax would be a claim against the warehouseman, secured by a lien against such property as he owned and used in connection with the warehouse. Certainly, in view of this situation, the State is justified in imposing such penalties for failure to report and promptly pay the tax as would minimize the danger of having the whiskey removed without satisfying the tax for which it stands in lien.

Furthermore, we think that the section of the statute which imposes the penalties may be considered as separable, and may be adjudged to be invalid without affecting the rest of the law. While undoubtedly the Legislature considered the imposition of the penalties as an important part of the statute, as a means of collecting the tax, we do not think it can with reason be held that the Legislature regarded the penalties as so vital as that the law would not have been passed without the penalty provision.

THE TAX IMPOSED BY THE ACT DOES NOT PLACE SUCH A BURDEN ON INTERSTATE COMMERCE AS TO VIOLATE ARTICLE 1, SECTION 8, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES.

We now come to that contention of appellee which we deem its most serious objection to the validity of the law, that is, the claim that so much of the law as imposes a tax of fifty cents on each proof gallon of whiskey transported in bond out of the State of Kentucky into another State is a tax or burden on interstate commerce and violates the Federal Constitution, and that by reason of the alleged invalidity of the act in this respect the whole law is invalid. The opinion in the Freiburg case, which was adopted by the lower Court as the opinion in the case at bar, does not pass on this question in any way whatever. This fact is probably due to the further fact that in the Freiburg case no question of interference with interstate commerce was raised in the bill. Nor was any such contention urged in the lower Court in the argument of the Freiburg case. The short, separate opinion rendered by the lower Court in the case at bar, and found on page 52 of the Transcript of Record, asserts that the tax imposed by the law in question is a property tax, and the same general theory runs through the entire opinion in the Freiburg case. We think such a construction of the law is utterly at variance with the plainly expressed purpose of

the Legislature. We think, in view of past legislation by Kentucky of a very similar character, and heretofore referred to in this brief, the Court must reach the conclusion that the law is an attempt on the part of the Legislature to impose an occupational or excise tax under Section 181 of the Constitution of Kentucky, and can be justified only upon that theory. Assuming it, however, to be a property tax—which we do not concede—the claim of appellee that as a property tax it is a burden upon interstate commerce is utterly without merit. The entire record in this case shows that the whiskey which we claim is merely the criterion by which to measure the amount of tax, and which appellee claims is the subject taxed, was manufactured in Kentucky and after manufacture remained in Kentucky. It was and is a part of the general mass of taxable property of the State. This being true, the right of the State to tax it continues unimpaired until it starts on its ultimate journey in interstate commerce, or until it is delivered to and received by a common carrier for movement in interstate commerce.

In the case of Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, the Supreme Court, speaking through Mr. Justice Bradley, used this language:

> "But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceased as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the

products of a State intended for exportation to another State would indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be a part of the general mass of property in the State, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States, there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case, The Daniel Ball, 10 Wall. 557, 565, 19 L. Ed. 1002: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey."

This opinion was quoted with approval in the case of Diamond Match Co. v. Village of Ontonagon, 188 U. S. 82, 47 L. Ed. 399. The rule announced in these two cases is so well established that we consider further citation of authority unnecessary. Therefore, if this tax is viewed as a property tax upon whiskey, and not as an occupational tax, the contention that it is a burden upon interstate commerce or an interference with interstate commerce is completely answered.

It is important, however, to determine whether or not the tax imposed by the law in question is an interference with interstate commerce when the law is viewed in its true character, namely, as an occupational or excise tax. We have heretofore endeavored to show that the real purpose of the law is to tax the one entire, continuous business of the manufacture and preparation of distilled spirits for market. As has already been suggested, this tax is attempted to be imposed upon that business done in Kentucky, and every separate act in the manufacture and preparation of whiskey for market, including its storage in warehouses and release therefrom in order to place same in commerce, is done in Kentucky. No attempt by this law is made to place any tax or any burden upon any act in connection with the business after the liquor produced in said business has been placed in the channels of interstate commerce. The manufacturing, which is a part of the business taxed; the storing in warehouses, which is a part of the busi-

products of a State intended for exportation to another State would indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be a part of the general mass of property in the State, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States, there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case, The Daniel Ball, 10 Wall. 557, 565, 19 L. Ed. 1002: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey."

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ness taxed; and the removal from bonded warehouses for the purpose of placing the article produced in commerce, are each and all acts done within the territorial limits and jurisdiction of the authority imposing the tax. It makes no difference what may have been the purpose of any person performing any of the various acts connected with the preparation of this product for market. It may have been manufactured for the express purpose of exportation into other States; it may have been acquired and stored in bonded warehouses in Kentucky for a similar purpose; it may have been removed from bond in Kentucky for a like purpose, without in any way affecting the right of the State of Kentucky to tax these activities connected with the business.

Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715.
Diamond Match Co. v. Village of Ontonagon, 188 U. S. 82, 47 L. Ed. 399.

We do not want the Court to lose sight of the proposition that the law in question does not tax the whiskey produced in Kentucky or stored in Kentucky. This is used merely as the measuring rod to determine the amount of tax due by the persons engaged in the tax occupation, and the fact that the whiskey transferred in bond out of the State is used as a criterion to determine the amount of the tax due does not result in a violation of the commerce clause of the Federal Constitution. Had the Legislature seen fit, we are of opinion that it might have

postponed the collection of the tax on that portion of the business represented by the liquor transferred under bond out of Kentucky and placed in bonded warehouses in other States until that liquor had been freed from bond in such other States. This procedure would not have resulted in imposing any unlawful burden on interstate commerce.

Taking the act as a whole, we think it can be safely said that the law does not tax the act of transferring whiskey in bond out of Kentucky, but it simply requires the payment of the license tax before the removal of the whiskey from the jurisdiction of the State. The Legislature evidently concluded that the State should collect its tax before the property which stood in lien for it passed beyond its jurisdiction. This requirement that the tax shall be paid before the property which stands in lien for it passes beyond the jurisdiction of the State, in our judgment can not be viewed as an unwarranted interference with interstate commerce. It is merely a precautionary measure to protect the State in the collection of its tax arising upon the business which produced the whiskey.

In the case of American Manufacturing Company v. St. Louis, 250 U. S. 459, a West Virginia corporation was engaged in manufacturing in the city of St. Louis, Mo. An ordinance of that city imposed a license tax on manufacturers conducting their business within the city. This was to be ascertained by and proportionate to the amount of sales of the

manufactured goods, whether sold within or without the State, and the payment was to be deferred until the goods so manufactured had been sold. The corporation shipped some of the goods manufactured by it in St. Louis to storage warehouses in other States, and from these warehouses sold such stored goods to customers in States other than Missouri. The company raised the objection that to require it to pay a license tax in St. Louis, measured in part by sales made in other States, was an unwarranted interference with interstate commerce. The Supreme Court, speaking through Mr. Justice Pitney, in respect of this contention, used this language:

> "In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce. And for like reasons, it has not the effect of imposing a tax upon the property or the business transactions of plaintiff in error outside of the State of Missouri, and hence does not deprive plaintiff in error of its property without due process of law. Our recent decisions cited in opposition to this view: Crew-Levick Co. v. Pennsylvania, 245 U. S. 292-297; Looney Co. v. Crane Co., 245 U. S. 178-188, and

other cases of the same kind referred to therein, are so obviously distinguishable that particular analysis is unnecessary."

See also:

U. S. Glue Co. v. Oak Creek, 247 U. S. 321.
Underwood Typewriter Co. v. Chamberland, 41 Sup. Ct. Rep. 45.

Under the principle announced in the cases, the law in question is not open to the objection that it violates the commerce clause of the Federal Constitution.

THE LAW DOES NOT VIOLATE THE PROVISIONS OF TITLE II OF THE VOLSTEAD ACT.

We come now to the last contention of appellee that the law violates Title II of the National Prohibition Act, passed October 28, 1919, which provides the terms and conditions on which whiskey may be withdrawn from bonded warehouses or transported in bond from one State to another. We do not believe that this contention is seriously urged by appellee. There is nothing in the entire Volstead Act that would indicate a prohibition against the State taxing the business of manufacturing and preparing whiskey for market. It is true that it is provided in Title II of the Volstead Act:

"* * * That nothing in this act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in

> government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts";

but the law in question in this case does not impose any special tax liability on the business of purchasing and selling warehouse receipts. The business taxed is an entirely separate and distinct business, and while the imposition of this tax will probably be taken account of by dealers in their various transactions in buying and selling warehouse receipts, it does not follow that this fact makes it a special tax liability on the business of purchasing and selling warehouse receipts. The Federal government collects $2.20 upon every gallon of whiskey distilled and stored in bonded warehouses. This tax must be taken into account by dealers in buying and selling warehouse receipts, but no one would attempt to argue that the collection of $2.20 government tax is prohibited by the section of the Volstead Act above quoted. The government tax is a tax on the privilege of manufacturing whiskey, and not on the business of dealing in warehouse receipts, and there is the same distinction between the tax imposed by the Kentucky law and the business of dealing in warehouse receipts.

In conclusion, we submit:

1st. That appellee failed to state in its bill facts sufficient to confer jurisdiction upon a court of equity.

2nd. That there is no equity in the bill, and that the appellee has a plain, simple, speedy and adequate remedy at law, and, under the well-established principles, often announced by this court it should not be allowed to stay and embarrass the collecting agencies of the State under these conditions.

3rd. That the pendency of proceedings in the State court, accompanied by a stay of proceedings therein, requires the Federal court to withhold action until the final determination of the issues in the State court.

4th. That the law imposes an occupational tax, fully authorized under Section 181 of the Constitution of Kentucky.

5th. That it does not violate Section 171 of the Constitution of Kentucky.

6th. That the penalties imposed for a violation of the law do not render the law invalid.

7th. That it does not in any of its provisions impose an unwarranted burden upon interstate commerce.

8th. That the law does not conflict with any of the provisions of the Volstead Act.

Respectfully submitted,

CHAS. I. DAWSON,
Attorney General.

W. T. FOWLER,
Assistant Attorney General.

APPENDIX.

AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whisky or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the State, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the tax so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act, and declaring an emergency to exist.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whisky or brandy or other species of double stamp spirits, in this State; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded

warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this State, wherein distilled spirits known as whisky or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly reports to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such person, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred,

the quantity thereof and the serial number of each of the packages so transferred.

3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this State, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehousemen, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

4. Every corporation, association, partnership and individual engaged in distilling spirits, known as whisky or brandy or other species of double stamp spirits in this State, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this State shall file month-

ly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in business covered by this

Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the State securing an adequate license tax thereon, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor.